

1 companies that have since become synonymous with computer technology: Intel and Microsoft. Intel
2 provided the microprocessor chips for IBM's original PC, and Microsoft supplied the system software
3 known as MS-DOS, an acronym for Microsoft Disk Operating System. Apple, 799 F. Supp. at 1018.
4 Microsoft's MS-DOS employed a character-based, non-graphical user interface that required the user to
5 type specific commands in order to perform tasks such as launching applications and copying files. See
6 Microsoft I, 84 F. Supp. 2d at 13; Apple, 799 F. Supp. at 1019.

7 With the early commercial success and user popularity of the Apple Macintosh's windows-based
8 computer graphics, it became clear to the industry that windowing programs were destined to become
9 the standard on every personal computer. This intensified the competition and led to what some
10 commentators dubbed the "window wars." See Microsoft Philosophy Presages Entry in Window Wars,
11 InfoWorld, Nov. 14, 1983, at 56 (Park Decl. Ex. C); John Markoff, Microsoft Does Windows,
12 InfoWorld, Nov. 21, 1983 (Park Decl. Ex. D) ("second front in the developing window wars").
13 Although Microsoft's business partnership with IBM resulted in the pre-installation of MS-DOS
14 on approximately 40% of personal computers sold by late 1983, see A Fierce Battle Brews Over the
15 Simplest Software Yet, Business Week, Nov. 21, 1983, at 114 (Park Decl. Ex. E), the company
16 aggressively joined the window wars with the announcement in November 1983 that it was developing
17 Windows, a window manager GUI designed to run on the IBM Personal Computer and IBM PC-
18 compatible computers, see Microsoft Does Windows, supra; Behm Decl. ¶ 2. Microsoft experienced
19 several delays with its production of Windows, and it was not released to consumers until 1985, in the
20 form of Microsoft Windows 1.0. See Peggy Watt, Windows Delayed Again, InfoWorld, Nov. 19, 1984,
21 at 18 (Park Decl. Ex. N); Apple, 799 F. Supp. at 1019. Microsoft's early Windows software was not a
22 full integration of the operating system and GUI, but rather operated "on top" of MS-DOS as a "shell"
23 and extended its graphical capabilities. Apple, 799 F. Supp. at 1019 & n.9 (explaining the differences
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1 between the Macintosh operating system and the MS-DOS/Windows combination).

2 While Microsoft made an early entry into the market for windows-based user interfaces, it is
3 undisputed that several other companies had developed interfaces with an overlapping windows feature
4 prior to the 1985 release of Windows 1.0. See Apple, 799 F. Supp. at 1024, 1027 (scènes à faire table).
5 Although at that time the computer industry may not have referred to a GUI's windowing capability by
6 using the term "windows" with the same uniformity as it does today, both the trade press and general
7 publications often referred to this revolutionary feature of personal computers as some variant of
8 "window." See Dvorak Decl. ¶ 17; Park Decl. Exs. A-R; A Fierce Battle, supra ("windowing programs
9 are expected to be standard on every personal computer"); Versatile – and Now Affordable, supra ("The
10 computer industry seems to thrive on buzzwords, and one of the current favorites is 'windows.'");
11 Andrew Pollack, Integrating the Software, N.Y. Times, Dec. 1, 1983, at D2 ("While Xerox, with its
12 Star, and Apple, with its Lisa, introduced windows and mice . . ."). Following the advent of Microsoft
13 Windows 1.0, the computer industry continued to use "windows" and "windowing" to refer to portions
14 of a computer's graphical screen dedicated to different programs running simultaneously or partitioned
15 in window-like boxes. See Dvorak Decl. ¶ 19.

18 **II. Microsoft Windows**

19 Since Microsoft's release of its first version of Windows in 1985, the company has developed
20 nine updated versions of the system software, culminating in the release of Microsoft Windows XP in
21 2001. See Behm Decl. ¶ 2. After ten years of developing and marketing Windows as an extension of
22 the underlying MS-DOS operating system, Microsoft combined both functions into one product in the
23 August 1995 release of Microsoft Windows 95. Caldera, 72 F. Supp. 2d at 1304-05. Windows 95 was
24 greeted with immediate and immense success, selling approximately 15 million copies in the first four
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1 months of its release. Id. at 1305. The company's success with its Windows products has continued to
2 the present day, and it now occupies a dominant position in the worldwide market for Intel-compatible
3 PC operating systems with a greater than 90% share of the market. Microsoft I, 84 F. Supp. 2d at 19;
4 see also Microsoft II, 253 F.3d at 50-80 (affirming district court's findings of fact and conclusion of law
5 under § 2 of the Sherman Act that Microsoft possessed monopoly power over the market for Intel-
6 compatible PC operating systems and that it illegally maintained its power through anticompetitive
7 means).

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9 Ever since 1983 when Microsoft first announced the development of window manager software
10 to extend the graphical capabilities of MS-DOS, it has promoted, sold and licensed the product and its
11 progeny under the Windows name. Van Alstyne Decl. ¶ 3. As with its popular software applications
12 Word, Excel and Office, Microsoft combines its corporate name with the specific Windows version,
13 such as Microsoft Windows NT 4.0 or Microsoft Windows 2000. See Dvorak Decl. ¶ 18. Microsoft has
14 adhered to this branding strategy for each of the ten versions of Windows it has released. See id.; Behm
15 Decl. ¶ 2.

16 17 **III. Registration of the Windows Trademark**

18 Microsoft applied for registration of its Windows trademark in August of 1990, and on January
19 10, 1995, the United States Patent and Trademark Office ("USPTO") issued U.S. Trademark
20 Registration No. 1,872,264. See Behm Decl. ¶ 3, Ex. A. Microsoft has also successfully registered the
21 Windows mark for several other uses besides its operating system software. See id. Exs. B-D. The
22 initial registration attempt, although ultimately successful, was not as straightforward as a reader of
23 Microsoft's Summary Judgment Memorandum might be led to believe. In fact, the initial registration
24 attempt was rejected by the USPTO in February of 1993. In a thirty-one page Final Action dated
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